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NO. ~~9558~~ 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HANK AVERY, *Petitioner*

v.

MIDLAND COUNTY, TEXAS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, which judgment reversed the judgments of the District Court and the Court of Civil Appeals and ordered the trial court to enter a judgment in accordance with the opinion of the Supreme Court. The judgment of the District Court, which was set aside by the Supreme Court, had granted to Petitioner the relief he sought by directing that the "one-man, one-vote" principle be applied.

OPINIONS BELOW

The opinions of the courts below are not reported officially. The majority opinion of the Supreme Court of Texas is unofficially reported at 406 S.W.2d 422. Same appears herein as Appendix A at p. 9. The dissent is reported at 406 S.W.2d 429 and appears herein as Appendix B at p. 21. Neither opinion gave to Petitioner the relief sought. The unofficial report of the opinion of the Court of Civil Appeals appears at 397 S.W.2d 919. It is Appendix C herein and appears at p. 29.

JURISDICTION

This suit was instituted in a State District Court seeking to have the apportionment of Midland County, Texas, into precincts heretofore made by the Commissioners Court of such County set aside and said Commissioners Court directed to reapportion said County so that the population of each precinct would be substantially equal. This right was claimed under Article V, Section 18, Article I, Sections 3 and 19 of the Constitution of the State of Texas and under Sec. 1 of the 14th Amendment of the Constitution of the United States.

The Judgment of the Supreme Court of Texas was entered on July 12, 1966, and within 15 days, the time provided by the Texas Rules of Civil Procedure. A motion for rehearing was filed by Petitioner. Such motion for rehearing was overruled on October 13, 1966, without any written opinion.

Jurisdiction to review this judgment is conferred on this court by 28 U.S.C. Sec. 1257 (3) since Petitioner is specially claiming a right under the Constitution and laws of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. Sec. 1257 (3) which is set forth in Appendix D, infra, at P. 36. Article V, Sec. 18 and Article I, Sections 3 and 19 of the Constitution of Texas, which are set forth in Appendix E, infra, at P. 37. The following enactments of the Texas Legislature: Articles 2339, 2340, 2342, 2351, 2352, 2352d, 2354, 2356, 2357, 2370b, Vernon's Civil Statutes of the State of Texas, which are set forth in Appendix F, infra, at P. 39. The United States Constitution, Amendment XIV, Section I, which is set forth in Appendix G, infra, at P. 53.

QUESTION PRESENTED

Whether the Fourteenth Amendment's equal protection clause permits the continuation of the practice of the Commissioners' Court of Midland County to divide said county into precincts in a manner whereby approximately 95% of the county's population is accorded only 25 per cent representation (1 member) on the 4-member governing board.[1]

STATEMENT OF THE CASE

Petitioner, as a citizen, taxpayer, and voter of the United States, and the State of Texas, and Midland County, Texas, brought this action individually and on behalf of others similarly situated, against Respondents to set aside an order of the Commissioners Court, which was entered on August

1. The Commissioners' Court is composed of the four Commissioners and the County Judge, who presides over same. The County Judge is elected countywide. Art. V, Sec. 18, Tex. Const. Thus while the presiding officer of the court is elected countywide, effective control is maintained by the three man majority.

31, 1963, to be effective as of January 1, 1964, dividing the County into four new Commissioners' Precincts (Tr. 345). Petitioner further sought to have said Respondents directed to reapportion said County into precincts having substantially an equal number of people. The Trial Court granted this relief but the Appellate Courts, including the Supreme Court of Texas, denied Petitioner's relief seeking to require the Commissioners Court to redistrict the County into four precincts of substantially equal population.

The Federal Question involved herein was raised in the Trial Court by the Petition upon which Petitioner went to trial. TR. p. 321. It was raised in the Supreme Court by assignment of error as shown by the opinion of that Court. See Appendix A, infra, p. 9. A copy of the Judgment of the Supreme Court of Texas is attached as Exhibit H.

The facts involved in the Appeal are simple and uncontroverted. On August 31, 1963, Respondents Gideon, Bryant, Moreland, and Osborne, constituting and acting as members of the Commissioners' Court of Midland County adopted an order dividing the County into four new Commissioners' Precincts (TR. 345). At such time, Midland County had a population of approximately 70,000 persons and in excess of 95% of such population resided in the new Commissioners Precinct No. 1 (TR. 345-6). At such time, 97% of the qualified voters of said County as shown by the lists prepared by the County Tax Assessor-Collector resided in the new Commissioners Precinct No. 1 (TR. 346). The Trial Court further found that the action of the Commissioners Court in setting such boundaries for precincts constituted invidious discrimination (TR. 347). The Trial Court further found that the County could have been divided into Commissioners' Pre-

cincts on a basis or plan taking into proper account population and other pertinent factors, which would have been and which would be practical for the convenience of the people. (TR. 346).

The above figures establish the following:

(1) The City of Midland represents 95% of the total population of Midland County, but is accorded only 25% representation (1) member on the four-member County governing board.[2]

(2) Five percent of the County's rural qualified voters can elect a majority of members to the board and thereby exercise perpetual veto power over the will of the majority of the County's urban voters.

(3) A rural voter who lives in Precinct No. 3 (there were 98 votes cast for Commissioner Precinct No. 3 in the 1964 Democratic Primary (S.F. 253) has 74½ times the voting power of a voter in Precinct No. 1 (where 7300 votes were cast in the Democratic Primary of 1964.).

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

There is presently pending before this court a case involving the same issues as the instant case. That case is No. 624, October Term, 1966, *Earle C. Moody, Et Al. Appellants v. Richmond M. Flowers, Et Al. Appellees.* The authorities cited in the *Moody Case, Supra,* fully discuss the issues involved and strongly supports the application of the "one man-one vote" principle enunciated in *Baker v. Carr,* 369 U.S. 186 to political sub-divisions of the States. Indeed no reason exists to hold that the duly elected representatives to one governing body must be chosen by application of

2. See Footnote 1, supra.

the "one man-one vote" principle and representatives to another governing body need not be chosen by such process.

Certainly it is no answer to state that one governing body is more important than the other. All governing bodies are important to those who are subject to their actions. The Commissioners Court of Midland County has the power to levy taxes (Art. 2352 V.A.C.S., Appendix F, Infra, P. 48) for various purposes. It also has the power, among others, to exercise general control over Roads, highways, and bridges (Art. 2351, Sec. 6, V.A.C.S., Appendix F, Infra, P. 40), provide and keep in repair all Public Buildings (Art. 2351, Sec. 7, V.A.C.S., Appendix F, Infra, P. 40), provide for distribution of commodities to persons in need of assistance (Art. 2351, Sec. 17A & B, V.A.C.S., Appendix F, Infra, P. 42); provide for an airport (Art. 2351, Sec. 18A-E V.A.C.S. Appendix F, Infra, P. 44.

The issues which the Commissioners' Court is required to handle are important ones affecting the everyday life of the citizens of the County. Thus each citizen should have an equal voice in determining such issues. Indeed, the power to tax, standing alone, should be sufficient to require that each citizen's vote be the equal of any other citizen's vote.

The Opinion of the Supreme Court of Texas states that the basic problem involved herein is the extent of political power that the metropolitan area should have in relation to the rural area. The Court goes on to state the scope of the Commissioners' Court is limited so that its major responsibilities are to the non-urban areas of the County. The Court then cites such factors as qualified voters, land areas, geography, miles of county roads and taxable values as justifying the debasement of the Urban voter's vote.

The 14th Amendment does not grant equal protection of the law to roads, geography or land areas nor to any object than persons. If the fear is that the Urban majority will take advantage of the Rural minority then it should be remembered that the 14th Amendment also protects the rural minority. It should also be remembered that the amount of tax paid by a person does not affect the value of his vote.

Petitioner has no political remedy. In fact, he has no remedy other than this cause. The Commissioners Court of Midland County has the power to reapportion itself but it has consistently refused to do so in such manner as to grant substantial equality to Petitioner and other members of his class. No other political body has the power to reapportion it. The majority of the Commissioners Court have made it perfectly clear that they have no intention of reapportioning the County in such manner as to give Petitioner's class substantial equality with the rural voter.

CONCLUSION

The jurisdiction and power to enforce the rights granted to Petitioner under the 14th Amendment rests in this court. Petitioner has no other remedy. The clear provisions of the 14th Amendment and the cases decided under it by this Court entitle Petitioner to the relief sought.

Wherefore, Premises considered, Petitioner prays that this Petition be granted and that the judgment of the Supreme Court of Texas be reviewed by this Court; that on such review the decision of the Supreme Court of Texas be reversed and this cause be remanded with instructions that the Commissioners Court of Midland County,

Texas, be reapportioned in such manner that each precinct has substantially the same number of people as each other.

Respectfully submitted,

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APPENDIX "A"

Opinion of Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

No. A-11272.

HANK AVERY,
Petitioner,

From Midland County,

v.

Eighth District.

MIDLAND COUNTY, TEXAS, ET AL.,
Respondents.

Article V, Section 18, of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people . . . into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one county commissioner . . ." This case presents for decision the question of the constitutional validity of such division in Midland County, Texas. The county was last redistricted by order of its commissioners court dated August 31, 1963, effective January 1, 1964. This suit by Petitioner, a resident property owner, taxpayer and qualified voter of Precinct No. 1, Midland County, attacks the division and seeks a redistricting. The judgment of the trial court set aside the current and previous orders dividing Midland County into commissioners precincts and ordered a redistricting of the county on the basis of equality of population in the precincts. The Court of Civil Appeals reversed the judgment of the trial court and rendered a take-nothing judgment against Petitioner. 397 S.W.2d 919.

We reverse the judgments below and remand the case to the trial court for further proceedings.

The findings of the trial court in its judgment, and the decretal portions thereof, will be helpful to an understanding of our holding and disposition of the cause. We quote from the findings of the trial court:

> ". . . Further, that on the date [August 31, 1963] of such Order and at all other relevant times, Midland County, Texas, had a population of approximately seventy thousand (70,000) persons and that in excess of ninety-five per cent (95%) of such population resided in said new Commissioners' Precinct No. 1 and that the remaining population of said County was distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. The court further finds that on the date of such Order and at all other relevant times in excess of ninety-seven per cent (97%) of the qualified voters of said County shown on the certified lists of qualified voters . . . resided in said new Commissioners' Precinct No. 1 and the remaining qualified voters of said County shown on said lists of qualified voters were distributed among said new Commissioners' Precincts Nos. 2, 3, and 4. Further, that on the date of such Order and at all other relevant times other pertinent factors, such as land area and taxable values of said County, were grossly disproportionate among such new Commissioners' Precincts of said County. . . .
>
> "The Court further finds that on the date of such Order and at all other relevant times the County of Midland could have been divided into Commissioners' Precincts on a basis or plan taking into proper account population, number of qualified voters, land area, taxable values, and other pertinent factors, which would have been and which would be practical and for the convenience of the people.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . did not give due and proper consideration to the aforementioned factors or to any other factors which should have been considered in effecting any division of said County into Commissioners' Precincts. Further, that there was no evidence on the date of such Order or at any other relevant time justifying or supporting the division made by said Order. Further, that the principal purposes of Defendants . . . in passing and approving the Order of August 31, 1963, were for political expediency, to maintain the status quo, and to insure that the rural areas of Midland County, Texas, would continue to elect the majority of the members of the Commissioners' Court of said County.

"The Court further finds that in passing and approving the Order of August 31, 1963, the Defendants . . . acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully, and in gross abuse of their discretion, and that such action constituted invidious discrimination. Further, that the division of said County . . . was not for the convenience of the people of Midland County . . . ."

The decretal portions of the judgment, however, were as follows:

"IT IS, THEREFORE, ADJUDGED AND DECREED by the Court that the order of the Commissioners' Court of Midland County, Texas, passed and approved on the 31st day of August, 1963, dividing and redistricting said County into new Commissioners' Precincts, and all prior orders of the Commissioners' Court of said County dividing the same into Commissioners' Precincts, be and they are hereby, in all things, set aside.

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that not later than the next succeeding July or August term of the Commissioners' Court of Midland County, Texas, that said Commissioners' Court . . . divide said County into four Commissioners' Precincts for the convenience of the people of said County *and in so doing* to establish such Commissioners' Precincts *so that each will have substantially the same number of people.*" (Italics added)

Petitioner attacks the current and prior orders of the commissioners court dividing Midland County into commissioners precincts as invalid under Article V, Section 18, Article I, Section 3, and Article I, Section 19, of the Texas Constitution and the equal protection clause of the Fourteenth Amendment to the United States Constitution, because of the gross population disparity. He argues that these constitutional provisions require equality of population in the precincts. Respondents assert, on the other hand, that Petitioner did not state or show a cause of action, or establish a justiciable interest or right to bring this suit as representative of a class, because equality of population in the precincts is not required but only that the precinct division be for the convenience of the people in the terms of Article V, Section 18, of the Texas Constitution.

Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights. Cf. *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Stovall v. Shivers,* 129 Tex. 256, 103 S.W.2d 363 (1937); *Dubose v. Woods,* 162 S.W. 3 (Tex. Civ.App. 1913, no writ hist.). We agree with the holding of the trial court that the current order of the commissioners court redistricting Midland County is not supportable under the requirements of the Texas and the United

States Constitutions for the reasons stated by the trial court in its judgment findings. We are not in agreement, however, with the judgment of the trial court to the extent that it orders a redistricting of the county on the sole basis of equality of population.

Article V, Section 18, of the Texas Constitution provides:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts . . . Divisions shall be made by the Commissioners Court provided for by this Constitution. . . . Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed."

Article I, Section 3, reads as follows:

> "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."

The county is a subordinate and derivative branch of state government. Its governmental body is the commissioners court composed of the four county commissioners with the county judge as the presiding officer. See Articles

2351 et seq., Vernon's Ann. Civ. Stats., for an enumeration of the statutory powers and duties of the commissioners court. The appellation "court" is a misnomer in the accepted meaning of the designation. See 11 Tex.L.Rev. 518 (1933). The commissioners are elected by the qualified voters of the precincts; the county judge is elected by the qualified voters of the entire county. The primary function of the commissioners court is the administration of the business affairs of the county. See *Ehlinger v. Clark,* 117 Tex. 547, 8 S.W.2d 666 (1928). Its legislative functions are negligible and county government is not otherwise comparable to the legislature of the state or to the Federal Congress, where the "one man one vote" principle is asserted in its most exacting and compelling sense. See *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed.2d 506 (1964)[1]; *Westberry v. Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964); *Gray v. Sanders,* 372 U.S. 868, 83 S.Ct. 801, 9 L.ed.2d 821 (1963). *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962).

This Court has not written upon the specific duty of the commissioners court under Article V, Section 18, to divide the county from time to time into four commissioners pre-

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1. "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 52 L.ed. 151, 159, 28 S.Ct. 40, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercised rests in the absolute discretion of the State.' The relationship of the States to the Federal Government could hardly be less analogous." Reynolds v. Sims, supra, 377 U.S. at 575.

cincts for the convenience of the people. There are four cases in which the Courts of Civil Appeals have done so: *Lewis v. Harris,* 48 S.W.2d 730 (Tex.Civ.App. 1932, writ ref.); *Ward v. Bond,* 10 S.W.2d 590 (Tex.Civ.App. 1928, no writ hist.); *Williams v. Woods,* 162 S.W. 1031 (Tex. Civ.App. 1914, no writ hist.); *Dubose v. Woods,* 162 S.W. 3 (Tex.Civ.App. 1913, no writ hist.). In *Harris,* 20 per cent of the people of the county elected three of the four commissioners and the taxable values in the one precinct containing 80 per cent of the population substantially exceeded those of the three other precincts combined. The suit was for a mandamus to compel a redistricting. It was held that such facts did not show that the discretion of the commissioners court had been abused by arbitrary action, the court saying:

> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations . . ."

Ward v. Bond considered a division order redistricting the county into new commissioners precincts equal in area but unequal in population to the extent that 54.5 per cent of the voters elected one commissioner, with 45.5 per cent electing the other three commissioners. The Court of Civil Appeals affirmed the action of the trial court sustaining the division order. The Court stated that disparity in population was not a sufficiently serious consideration to justify

a reversal of the trial court judgment but pointed out that the disparity in population would shortly disappear as the result of the construction of a railroad through the county. The Court also sought to distinguish the *Dubose* and *Williams* cases on the ground that the new division lines in these cases practically deprived some voters of their right of franchise.

The *Williams* and *Dubose* cases were sequels and county districting orders were held invalid in each case. In *Williams*, Dunn County was divided in such manner that 500 voters would elect two commissioners and 120 voters would elect two commissioners. There was a similar disparity in area. It was recognized by both parties that the precincts had been divided along ethnic lines, the Court saying:

> "The great disparity in acreage and population is sought to be justified only on the ground that the county should be so divided as to give the Anglo-Saxons a part of the precincts and the Mexican population the others. Convenience of the voter did not enter the consideration of the Court, but divisions of the territory were made that would tend to foment strife among citizens of different races."

Dubose involved a division of Dunn County under which 500 voters elected one commissioner and 140 voters elected the remaining three commissioners, together with similar disparity in area and public roads. Moreover, the precincts were drawn so as to deprive two towns in the county of polling places where they had been located for the past thirty years. The Court said: "The facts alleged in the sworn petition show conclusively that as to neither class of precincts is the division of the county one which is convenient to the people of said county; and in fact such

division is so arbitrary and wrong that the court should not for a moment tolerate the same . . . When considered as commissioners precincts, it is manifest that wrong was committed in making the districts largely disproportionate as to acreage and population . . . The government of the county will be taken away from the majority of the voters. . . ."

The requirements of Article V, Section 18, of the Texas Constitution are to be construed and enforced consistently with Article I, Section 3, commonly referred to as the equal rights or equal protection clause of the Texas Constitution. Cf. *Railroad Commission v. Shell Oil Co.,* 139 Tex. 66, 161 S.W.2d 1022 (1942). Equal protection of laws is not secured if persons are deprived of equality in political rights or otherwise subjected to an arbitrary exercise of governmental powers. See *Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944); *Mumme v. Marrs,* 120 Tex. 383, 40 S.W.2d 31 (1931); *Glasgow v. Terrell,* 100 Tex. 581, 102 S.W. 98 (1907). This Court considered the terms "convenient" and "convenience of the people" appearing in Article V, Section 18, in *Williams v. Castleman,* 112 Tex. 193, 247 S.W. 263 (1922), involving an order of the commissioners court creating an additional justice of the peace precinct. Two principles relevant here were there recognized, namely, that in discharging the requirements of Article V, Section 18, the commissioners court was given some discretion to meet the "changing needs of the people" but such must be "exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion."

The basic problem of Texas counties in the respects under review is the extent of political power which the

metropolitan areas should have in relation to the rural areas. The very fact of population concentration enables the city voters to elect the county-wide officers. We recognized in *Pritchard & Abbott v. McKenna,* 162 Tex. 617, 350 S.W. 2d 333 (1961), that the county commissioners court is not charged with the management and control of all of the county's business affairs; and that the various officials elected by all the voters of the county have spheres that are delegated to them by law and within which the commissioners court may not interfere or usurp. The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the commissioners court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas. Theoretically, the commissioners court is the governing body of the county and the commissioners represent all the residents, both urban and rural, of the county. But developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers.

As we have said, equal rights and equal protection of laws require equality in political rights and there may be circumstances under which equality in population of political subdivisions electing representatives to an overall governing body is essential to equality in voting rights. On

the other hand, the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population in commissioners precincts upon the basis of additional relevant factors such as number of qualified voters, land areas, geography, miles of county roads and taxable values. The trial court in its judgment found that such considerations could have been taken into account in the precinct division in Midland County, notwithstanding which he ordered a redistricting to achieve substantial equality of population.

We agree with the holding of the trial court that there is obvious arbitrariness in the current districting order here under attack because of the patent malapportionment of the commissioners precincts of Midland County. The judgment findings of the trial court show the absence of any rational basis therefor.

We disagree with the judgment of the trial court in its requirement that Midland County be redistricted into commissioners precincts solely upon the basis of population. For the reasons before stated, we are of the opinion that the equal protection of the law clauses of the Texas and the United States[2] Constitutions do not require a commissioners precinct division of Texas counties on this basis in all cases, dependent, of course, in each case upon the

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2. "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." Amend. XIV; § 1, United States Constitution. See **Tedesco v. Board of Supervisors,** 43 So.2d 514 (La.App.), appeal denied, 339 U.S. 940; 70 S.Ct. 797, 94 L.ed. 1357 (1960), and the clarification in **Baker v. Carr,** 369 U.S. at 235, of the dismissal of the appeal in **Tedesco** for want of a substantial Federal question, to wit, there was a rational justification for the population disparity in the districting of city council seats.

existence and effect of other relevant factors such as those we have mentioned. But neither this Court nor the district court has the power to redistrict Midland County into commissioners precincts. This is the responsibility of the commissioners court and is to be accomplished within the constitutional boundaries we have sought to delineate. In no event is a population disparity sustainable against a showing of discrimination, fraud, arbitrariness or abuse of discretion.

The judgments of the Court of Civil Appeals and of the trial court are reversed and the cause is remanded to the trial court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process.

Zollie Steakley
Associate Justice

Associate Justice Hamilton not sitting.

Associate Justice Smith dissenting.

Opinion delivered
July 13, 1966.

APPENDIX "B"

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. I would affirm the judgment of the Court of Civil Appeals. This is not a "one man-one vote case," nor is there any constitutional requirements for equality in commissioners precincts. Article V, Section 18[1] of the Texas Constitution governs the organization of commissioners precincts. It is well settled by Texas cases that the phrase "for the convenience of the people" in said Article, confers on commissioners courts the discretion to divide precincts in some physically convenient way, and that there is no requirement for equality of population, and no duty to provide precincts which are equal in population. This is an "abuse of discretion" case," the only question before this Court being whether a single private citizen, as here, has a vested right and cause of action to revise and review a commissioners court precinct order

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1. "Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954."

to achieve equality in population. The trial court in its judgment, made several findings of fact, as the Court has indicated, but the decretal portion of the judgment only relates to the finding in regard to population disparity. The judgment directs the commissioners court to use equal distribution of population as the dominant factor in redistricting the County. The judgment rendered by this Court is meaningless. If the Court remands the cause generally for a new trial, citizen Avery has accomplished nothing. On the other hand, if the judgment of the trial court striking down the commissioners court order is upheld, still nothing has been accomplished, except to create additional chaos and confusion. This is true, because Avery, as a single individual and private citizen, has no right or standing in court to question the way the government is run or organized, including the location of commissioners precinct boundaries in Midland County, Texas, unless and until he can show some personal loss, damage or harm to his private interests resulting from the governmental operation. See Meredith v. Sharp, Tex.Civ.App., 256 S.W.2d 870 (1953, writ refused, no reversible error) with Per Curiam opinion, 152 Tex. 437, 259 S.W.2d 172. This case was one wherein mandamus was sought to require a commissioners court to create the office of Justice of the Peace, Place No. 2 of Justice of the Peace, Precinct One of Gregg County, Texas. I think the Court would have made the same holding had the cause been before the appellate courts on appeal.

The Court upheld the judgment of the trial court that Article V, Section 18 of the Texas Constitution "confides in the Commissioners' Court the authority to create a justice of the peace court as here sought; that the convenience of the people is the basic purpose for desig-

nating such an additional justice court; *and that the creation of such additional justice of the peace court is a discretionary act of the Commissioners' Court and not a ministerial function of such court.*" [Emphasis added.] The Court then said:

> "We cannot escape the import of the use of the term 'for the convenience of the people' in Sec. 18, supra; 16 C.J.S., Constitutional Law, § 23. The latitude so granted the Commissioners' Court to create not less than four and not more than eight such precincts, and the power to change the boundaries of such precincts from time to time emphasizes the intent to vest discretionary powers in the Commissioners' Court in determining whether or not the creation of such additional court would be for the convenience of the people, that is suitable, appropriate or advisable to meet the needs of the people. This discretionary power on the part of the Commissioners' Court is fully recognized in Williams v. Castleman, 112 Tex. 193, 247 S.W. 263, by our Supreme Court, which involved an affirmative act of the Commissioners' Court in creating such an additional Justice Court, and in the holdings in Lewis v. Harris, Tex.Civ.App., 48 S.W.2d 730, and Ward v. Bond, Tex.Civ.App., 10 S.W.2d 590, 594, which dealt with the discretionary powers of a Commissioners' Court as related to the latter clause of Sec. 18, supra, in altering a Commissioners' Precinct.
>
> "'Mandamus will not lie to control or review the action of an official or board upon matters involving the exercise of discretion or judgment confided to such official or board.' Lewis v. Harris, supra, 48 S.W.2d at page 732; 28 T. J. (Mandamus), Sec. 33."

This holding in regard to discretionary power to create justice courts is equally applicable to this case where the commissioners court has exercised its discretion in changing its boundary lines.

If it can be said that the judgment of the trial court is based upon a finding of abuse of discretion and that Avery has a justiciable interest, I nevertheless maintain that the trial court confined its holding to require a redistricting of Midland County into commissioners precincts upon the basis of population alone.

Avery is in no position to individually attack or set aside the order creating Midland County commissioners precincts because of a disparity in the population of the several precincts in the absence of a showing of some damage, harm, inconvenience, or financial loss to himself personally. This he has failed to do. There being no duty to provide Avery with equally populated commissioners precincts, no legal wrong has been done to him by refusal to divide in that way; there has been no invasion of his personal rights by including him in a commissioners precinct with a population larger than the other precincts.

Avery attempts to also bring this suit in terms of a class action. In this attempt he completely fails. In his petition he states his capacity as follows:

> "Plaintiff files this petition on behalf of himself and other persons similarly situated in the City of Midland, Precinct No. 1, Midland County, Texas, and states that he is a resident, taxpayer, and legally qualified voter and elector of the City of Midland, Precinct No. 1, Midland County, Texas, and that, as such, he is legally qualified to vote for municipal, precinct and county offices in Midland County, Texas."

The right which he sought was as follows:

> "The Plaintiff has a right and interest to see that *his* civil rights and liberties and in particular *his* right and interest in an equitable apportionment of voting power for members of the Commissioners Court are protected in accordance with the terms of the Texas Constitu-

tion and Section 1 of the 14th Amendment to the Constitution of the United States."

The pleadings in this case upon which Avery went to trial are completely void of allegations which would qualify as a class action. The petition fails to comply with any of the provisions of Rule 42,[2] Texas Rules of Civil Procedure. Only a quick glance at the rule is required to conclude that Avery does not seek to qualify under subdivision (1) of the rule, because the rights which he seeks to enforce are *his* rights and liberties and *his* right to equitable voting power. Such right is not joint or secondary and on its face could not be the proper subject of a class action under subdivision (1) of the rule. Subdivision 2 is out, because there is no specific property involved in this action. Avery's petition fails to qualify him as representing a class, in that it fails to state that

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2. "(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, in behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Dismissal or compromise. A class action shall not be dismissed nor compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it. Amended by order of September 20, 1941, effective December 31, 1941."

there are persons constituting a class. The petition on which he went to trial does not allege that there are other persons having a common interest with Avery in an adjudication of a common question of fact or law. In fact, the record shows that public officials and many others who publicly refused to support Avery, were all citizens of Midland. The evidence and the proceedings fail to show any support of Avery's position from the City of Midland or the residents of the City as a group. The petition does not describe any identifiable class of persons nor state or show that they are so numerous as to make their joinder in the suit impracticable. There is nothing in the petition to show that there are others "similarly situated." The pleadings are lacking and Avery produced no evidence to warrant a valid class judgment. See Schenker v. City of San Antonio, Tex.Civ.App., 369 S.W.2d 626 (wr. ref., n.r.e. 1963).

Since the subject matter of Avery's complaints in this Court is the disparity of population, and since that subject is a matter of *public* not *private* concern, and since Avery did not properly allege or prove a class action in the trial court, so as to represent the public, the result is that he never reaches or gets to the question of substantial evidence, abuse of discretion, or his asserted claims to *alternative*[3] relief.

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3. The prayer, reflecting the relief sought, reads as follows:

"Wherefore, premises considered, Plaintiff prays that Defendants be cited to appear herein and that upon final hearing Plaintiff have judgment as follows:

"(a) That the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said county into

Avery has no standing in this Court to complain of the action of the Court of Civil Appeals on his substantial

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Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people.

"(b) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting a majority of the members of said Commissioners' Court, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing and approving the Order of August 31, 1963, dividing Midland County into Commissioners' Precincts and that said Order, and all prior Orders dividing said County into Commissioners' Precincts, be set aside and that said Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, be directed to pass a new Order dividing said County into proper consideration to equality of population, qualified voters, land area, tax values, miles of County roads, and other pertinent things among said Commissioners' Precincts.

Commissioners' Precincts for the convenience of the people, giving

"(c) In the alternative, that the Defendants Gideon, Bryant, Moreland and Osborne, constituting a majority of the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly, and wrongfully and in gross abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandamus issue compelling the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court, to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(d) In the alternative, that the Defendants Gideon, Bryant, Moreland, and Osborne, constituting the members of the Commissioners' Court of Midland County, Texas, acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully and in abuse of their discretion in passing said Order and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that writ of mandatory injunction issue restraining and enjoining the Defendants Gideon, Bryant, Moreland, Osborne and Culver, as members of the Commissioners' Court from continuing said Order in effect or calling or conducting any election there-

evidence and alternative relief claims. I would dismiss this cause for want of jurisdiction. In no event does the Constitution of the United States or the Texas Constitution require that Midland County be divided into four equally populated precincts. The Court's view, if finally adopted, will lead to great confusion and uncertainty not only in Midland County, but in every county in Texas with citizens who have a desire to substitute their judgment for that of the commissioners courts. It seems to me that this is not the proper case in which to extend the doctrine of the one man-one vote rule to the governing bodies of local governments such as commissioners courts. Perhaps, in a proper case, the federal courts will in the future take jurisdiction under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution, but I cannot imagine a situation, much less the one presented in this case, where the Texas Constitution or the case law would warrant a holding that there must be equality of population in Commissioners precincts.

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under and directing said Defendants to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing so establish, as nearly as possible and practicable, such Precincts so that each will have substantially the same number of people, qualified voters, square miles, and other pertinent things.

"(e) In the alternative, that the Order of said Defendants on August 31, 1963, dividing Midland County into Commissioners' Precincts was and is repugnant to and in conflict with one or more of the following: The Fourteenth Amendment, Section 1, of the Constitution of the United States of America and Article 1, Sections 1, 2, 3, and 19, of the Constitution of the State of Texas, for the reason that it deprives Plaintiff and others similarly situated of their constitutional rights, privileges, liberties, and guarantees, and that it and all prior Orders dividing said County into Commissioners' Precincts be set aside and that said Defendants, as members of the Commissioners' Court be directed to pass a new Order dividing said County into Commissioners' Precincts for the convenience of the people and in so doing to establish, as nearly as practicable and possible, such Precincts so that each will have substantially the same number of people and qualified voters."

APPENDIX "C"

OPINION OF THE COURT OF CIVIL APPEALS

CLAYTON, Justice.

This is a county commissioners' precinct redistricting case, appealed from the judgment of the District Court of Midland County, Texas. Avery, appellee here, brought the suit as a resident property owner, tax payer and qualified voter of the City of Midland, County Commissioners' Precinct No. 1, Midland County, Texas, "individually and on behalf of other persons similarly situated and qualified" against the County of Midland and its county judge and four county commissioners, appellants here. Plaintiff-appellee's pleadings reflect that, since the time of its incorporation in 1901, the City of Midland, lying virtually in its entirety in Commissioners' Precinct No. 1, has been the only incorporated city, town or village in Midland County. The city's population had grown through the years until at the time of the 1960 Federal Decennial Census its population represented 92.48 per cent of the population of the county, and Precinct No. 1 contained 97.80 per cent of the population of the county. Of the qualified voters of the county in that year, 97.88 per cent resided in Precinct No. 1. Plaintiff asserted that other things, such as market value and assessed value of taxable property, miles of county roads, land area, allocation and use of county funds and revenue, etc., were disproportionately distributed among the commissioners' precincts of the county, making the precincts as established "grossly impractical and inconvenient to the people". In September, 1962, plaintiff petitioned the Commissioners' Court for a redistricting of

the county's precincts, but "such petition and request was refused". In that same month this suit was filed to compel a redistricting, invoking the jurisdiction of the district court under its supervisory control of county commissioners' courts as provided in Article V, § 8 of the Texas Constitution, Vernon's Ann.St. During the pendency of this suit, and in July and August, 1963, public hearings were held by the Commissioners' Court on the matter of redistricting the county, during which time plaintiff and others testified or presented plans for such redistricting. On August 31, 1963, plaintiff's pleadings relate, the Commissioners' Court adopted an order, effective January 1, 1964, redistricting Midland County into commissioners' precincts, which order, plaintiff alleges, made only insignificant changes in the boundaries of commissioners' precincts and in no way corrected or lessened the great disparity in population, qualified voters, land area, assessed value of taxable property, miles of county roads and other pertinent things among the commissioners' precincts of said county; that in passing said order the commissioners had acted arbitrarily and capriciously, in abuse of their discretion and without regard to the convenience of the people of Midland County or the rights, privileges and guarantees of plaintiff and others similarly situated by the Constitution of the State of Texas and of the United States. Plaintiff prayed that such order of the Commissioners' Court of August 31, 1963 and all prior orders dividing Midland County into commissioners' precincts be set aside and that writ of mandamus issue compelling the defendants to pass a new order giving proper consideration to equality of population and the other factors said by plaintiff to be pertinent in the division of the county into commissioners' precincts.

The presiding judge, who heard the cause without the intervention of a jury, found that Precinct No. 1 had in excess of 95 per cent of the total population of the county under the order of August 31, 1963, and that on the date of such order over 97 per cent of the qualified voters of the county resided in said Precinct No. 1, and that there was a gross disparity of other pertinent factors, such as land area and taxable values in said order as in all previous orders dividing said county into commissioners' precincts; that in passing such order of August 31st the defendants had acted arbitrarily, capriciously, unreasonably, unfairly and wrongfully, in gross abuse of their discretion, and that their action constituted invidious discrimination. The court's judgment further found that the said order was not for the convenience of the people of said county as required by Article V, § 18 of the Constitution of the State of Texas. The judgment of the court set aside said order and all previous orders dividing the county into commissioners' precincts, and ordered that the Commissioners' Court, not later than the next succeeding July or August term of said court, "divide said County into four Commissioners' Precincts for the convenience of the people of said County and in so doing to establish such Commissioners' Precincts so that each *will have substantially the same number of people*". (Emphasis supplied).

[1] Appellant Commissioners advanced twelve points of error and appellant Midland County presented two points of error attacking the District Court's order as above set out. We deem it unnecessary to discuss these points separately or at length, but will treat only those assignments which relate to that part of the order underscored above which embodies the mandatory requirement that the county be divided into precincts so that each would have sub-

stantially the same number of people. We are in accord with the assertion by appellant Commissioners that "neither the Constitution of the United States nor the Constitution of Texas, as construed and interpreted by the courts, contains any requirement that county commissioners precincts be equal to each other in population * * *" Article IV, § 4 of the United States Constitution merely provides that "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." Amendment XIV, section 1 provides: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article V, § 8 of the Texas Constitution provides that the district courts "shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; * * *"; and § 18 of the same Article relates to commissioners' precincts:

> "Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. * * * Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner * * *. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. * * *"

Among the scant authority in Texas on the subject of establishment of commissioners' precincts is to be found in the 1932 opinion of this court in Lewis v. Harris, 48 S.W. 2d 730, in which a writ of error was refused. This was a redistricting case which arose in Upton County, and we find the facts involved and the language employed so nearly applicable to the case before us as to justify quotation therefrom at some length. The court states:

> "* * * Appellants cite section 18, art. 5, of the State Constitution which, in substance, requires the division of the county 'from time to time, for the convenience of the people, into precincts,' and that the commissioners' precincts shall be four in number.
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> "Disregarding legal conclusions stated therein, the petition here simply shows a state of facts which gives to the town of Rankin and precincts Nos. 1, 2, and 3 a power of control over the commissioners' court of the county out of proportion to their population, voting strength, and taxable values, thereby denying to the town of McCamey and precinct No. 4 the representation upon the court and power of control to which such town and precinct is justly entitled by the population, voting strength, and taxable values thereof.
>
> "As applied to different situations, the phrase 'convenience of the people,' as used in the Constitution, may have different meanings, but in our opinion it cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts, from time to time, so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths, and taxable valuations. This is what the present action seeks to compel. The location of cities

and towns in certain counties is no doubt such that it cannot be conveniently done. From a political viewpoint it is desirable and just that the precincts should be so arranged, but in some instances it is doubtless not practical.

"It is not alleged that a redivision of the county as sought is practical and convenient for the people. Plaintiffs simply base their demand upon population, voting strength, and taxable valuation. The present division is inconvenient in the sense only that the town of McCamey and precinct No. 4 have not the representation upon and control of the commissioners' court to which the plaintiffs say such town and precinct are justly entitled by the population, voting strength, and taxable valuation thereof.

"There is no law imposing upon a commissioners' Court the duty of rearranging the commissioners' precincts of a county upon such a basis, and the writ of mandamus will not lie to compel such action. The demurrers were properly sustained."

The cited case is given recognition in Hatter v. Worst, 390 S.W.2d 293 (Tex.Civ.App., 1965; n.r.e.), although Lewis v. Harris was not controlling on the issue involved in the latter case. An analytical and well-documented discussion of the case now before us is to be found in the Winter, 1965 issue of the Baylor Law Review, Vol. XVII, No. 1, p. 41, written by J. William Davis, which it would be well for the reader of this opinion to review for additional background information on the case before us.

[2, 3] We have come to the conclusion that the judgment of the lower court in the instant case must be reversed. It has been stated here that this judgment orders the Commissioners' Court of Midland County to divide said county into four Commissioners' Precincts "for the

convenience of the people of said County" and in so doing to establish such commissioners' precincts "so that each will have substantially the same number of people". The order thus exceeds the admonition contained in the Texas Constitution that requires only that the division of the county in such precincts be "for the convenience of the people", which, as stated in Lewis v. Harris, supra, cannot properly be construed as imposing upon a commissioners' court the absolute duty of rearranging the boundaries of commissioners' precincts so as to accord to each precinct representation upon and power of control of the commissioners' court in proportion to their respective populations, voting strengths and taxable valuations, however desirable, in certain instances, such a division might be. Just as there is no law or constitutional requirement that such a division be made, neither is there authority, in our opinion, for the lower court herein to compel the establishment of commissioners' precincts so that each will have substantially the same number of people. Following this reasoning, the lower court was without authority to enter the order embodied in its judgment, and such judgment must therefore be reversed.

Since this case has been thoroughly tried and expertly briefed by both parties, we feel that no useful purpose would be served by a remand, and this cause is therefore here rendered for the appellants.

Reversed and rendered.

APPENDIX "D"

28 U.S.C. Sec. 1257 (3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX "E"

CONSTITUTION OF STATE OF TEXAS

§ 18. Division of counties into precincts; election of constable and justice of the peace; county commissioners and county commissioners court

Sec. 18. Each organized county in the State now or hereafter existing, shall be divided from time to time, for the convenience of the people, into precincts, not less than four and not more than eight. Divisions shall be made by the Commissioners Court provided for by this Constitution. In each such precinct there shall be elected one Justice of the Peace and one Constable, each of whom shall hold his office for four years and until his successor shall be elected and qualified; provided that in any precinct in which there may be a city of 8,000 or more inhabitants, there shall be elected two Justices of the Peace. Each county shall in like manner be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed. As amended Nov. 2, 1954.

Art. I. Sec. 3

§ 3. Equal rights

Sec. 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to

exclusive separate public emoluments, or privileges, but in consideration of public services.

Art. I. Sec. 19

§ 19. Deprivation of life, liberty, etc.; due course of law

Sec. 19. No citizen of this State shall be deprived of life, liberty property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

APPENDIX "F"

ACTS OF THE TEXAS LEGISLATURE RELATING TO COMMISSIONERS COURT

V.A.C.S. Art. 2339

Article 2339. [2236] [1532] [1509] Election

Each county shall be divided into four commissioners precincts, and one commissioner shall be elected biennially in each precinct, and each commissioner shall hold his office for two years. Const. art. 5, sec. 18; Acts 1876, p. 51, sec. 3; G.L. vol. 8, p. 887.

V.A.C.S. Art. 2340

Art. 2340. [2239] [1535] [1512] Oath and bond

Before entering upon the duties of their office, the county judge and each commissioner shall take the official oath, and shall also take a written oath that he will not be directly or indirectly interested in any contract with, or claim against, the county in which he resides, except such warrants as may issue to him as fees of office. Each commissioner shall execute a bond to be approved by the county judge in the sum of three thousand dollars, payable to the county treasurer, conditioned for the faithful performance of the duties of his office, that he will pay over to his county all moneys illegally paid to him out of county funds, as voluntary payments or otherwise, and that he will not vote or give his consent to pay out county funds except for lawful purposes. Acts 1923, p. 14.

V.A.C.S. Art. 2342

Art. 2342. [2237] [1533] [1510] The Court

The several commissioners, together with the county

judge, shall compose the "Commissioners Court," and the county judge, when present, shall be the presiding officer of said court. Const. art. 5, sec. 18; Acts 1876, p. 51; G.L. vol. 8, p. 887.

V.A.C.S. Art. 2351

2. POWERS AND DUTIES

Art. 2351. [2241] [1537] [1514]. Certain powers specified

Each commissioners court shall:

1. Lay off their respective counties into precincts, not less than four, and not more than eight, for the election of justices of the peace and constables, fix the times and places of holding justices courts, and shall establish places in such precincts where elections shall be held; and shall establish justices precincts and justices courts for the unorganized counties as provided by law.

2. Establish public ferries whenever the public interest may require.

3. Lay out and establish, change and discontinue public roads and highways.

4. Build bridges and keep them in repair.

5. Appoint road overseers and apportion hands.

6. Exercise general control over all roads, highways, ferries and bridges in their counties.

7. Provide and keep in repair court houses, jails and all necessary public buildings.

8. Provide for the protection, preservation and disposition of all lands granted to the county for education or schools.

9. Provide seals required by law for the district and county courts.

10. Audit and settle all accounts against the county and direct their payment.

11. Provide for the support of paupers and such idiots and lunatics as cannot be admitted into the lunatic asylum, residents of their county, who are unable to support themselves. By the term resident as used herein, is meant a person who has been a bona fide inhabitant of the county not less than six months and of the State not less than one year.

12. Provide for the burial of paupers.

13. Punish contempts by fine not to exceed twenty-five dollars or by imprisonment not to exceed twenty-four hours, and in case of fine, the party may be held in custody until the fine is paid.

14. Issue all such notices, citations, writs and process as may be necessary for the proper execution of the powers and duties imposed by such court and to enforce its jurisdiction.

15. Said court shall have all such powers and jurisdiction, and shall perform all such other duties, as are now or may hereafter be prescribed by law. Const. art. 5; Acts 1876, p. 51; G.L. vol. 8, p. 887; Acts 1885, p. 89; G.L. vol. 9, p. 708; Acts 1911, p. 236.

16. Said Court shall have the authority to use county road machinery and funds from the General Fund or Road and Bridge Funds in cleaning streams and in aiding flood control when such improvements are deemed to be of aid of the county in the maintenance and the building of county roads, in counties having a population of from

nineteen thousand, eight hundred and fifty (19,850) to nineteen thousand, eight hundred and ninety-five (19,895) according to the last Federal Census. Added Acts 1939, 46th Leg., Spec. L., p. 588, §1.

17. a. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is hereby empowered to create a revolving fund or funds and to make appropriations thereto out of the general revenue of such county; and such revolving fund shall be used by such county only in cooperation with the United States Department of Agriculture to aid and assist in carrying out the purposes and provisions of an Act of Congress of the United States pertaining to the distribution of commodities to persons in need of assistance, under the direction of the United States Department of Agriculture; provided, however, that the county shall have on hand at all times either the moneys appropriated to such revolving fund or funds or the equivalent thereof in stamps issued by the United States Department of Agriculture under the Food and/or Cotton Stamp Plan, which stamps are convertible into cash at any time.

b. In such counties of this State exercising the powers herein granted, an issuing officer shall be appointed to carry out the provisions of this Act and to administer the funds herein appropriated. Such issuing officer shall be a citizen of the State of Texas and appointed by the County Judge of such County subject to the approval of the Commissioners Court thereof. He shall be required to furnish a good and sufficient surety bond in such amount and upon such terms and conditions as may be required by the Commissioners Court and the United States Department of Agriculture. Such issuing officer shall receive a salary, to be paid out of the general fund or any other fund of the

county, except constitutional funds, not otherwise appropriated, not to exceed Two Hundred Dollars ($200) per month, and may appoint such cashiers and other assistants as may be authorized by such Court. The premiums of all bonds which may be required of such issuing officer, cashiers or other assistants, shall be paid by the Commissioners Court out of any available funds therefor belonging to such county.

c. Provided however the powers herein granted to such counties may be exercised by two (2) or more counties in conjunction with each other and in cooperation with the United States Department of Agriculture. And when such powers are exercised by two (2) or more counties jointly, the County Judges of such counties shall appoint the issuing officer, fix such appointee's bond and to do all other things necessary to cooperate with the United States Department of Agriculture in the same and like manner as is herein granted to any one county of this State.

d. Provided that such Commissioners Courts of such counties may cooperate with any incorporated city or town within such county or counties on such conditions and requirements as may be promulgated by such Commissioners Court or Courts.

e. Whenever any county herein authorized to create such a revolving fund ceases to participate therein the issuing officer appointed under the provisions hereof shall forthwith reduce all stamps to their equivalent in money and return such moneys then on hand to the fund from which same was originally appropriated, and render a full account of his administration thereof to the Commissioners Court or Courts as the case may be. Added Acts 1941, 47th Leg., p. 204, ch. 146, §1.

18(a) The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is empowered in all cases where said county has heretofore acquired, or may hereafter acquire, land for an airport through purchase or gift from any person or source whatever, including the Federal Government, or any agency thereof, to lease said land and/or the facilities thereof, or any part thereof to any person or corporation upon such terms as the Commissioners Court shall deem advisable for airport purposes, or other purposes, provided any such lease is not inhibited by the terms of the grant to such county. Said counties through such Commissioners Courts are also hereby expressly authorized and empowered to contract with reference to oil, gas or other minerals or natural resources which may be vested in said counties by virtue of the ownership of such airports and to execute and deliver to any person upon such conditions and for such consideration, including oil payments, gas payments, overriding royalties, etc. as the Commissioners Court may deem advisable, mineral deeds or mineral leases of all or any part of said minerals, or the rights thereto, which are vested in the county and to generally contract for the exploration and development of the minerals underlying said land or any part thereof.

(b) The proceeds from the sale of any minerals or mineral rights, or the consideration for the execution of any mineral leases, including cash bonuses, delay rentals and royalties, need not be devoted to the maintenance, upkeep, improvement and operation of such airport, but may be expended by the Commissioners Court for any lawful purpose.

(c) The proceeds received, or to be received from any person from the lease of the surface of said land, or from

the lease of the facilities thereof, or any part thereof, for purposes other than airport purposes, or for purposes other than those relating to the operation of an airport, may likewise be expended by the Commissioners Court for any lawful purpose.

(d) The proceeds received, or to be received, from any person for any lease of the surface of said land, or for the lease of the facilities thereof, or any part thereof, for airport purposes, or for purposes related to the operation of an airport, shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of any fiscal year of operation may be expended by such Commissioners Court for any lawful purpose.

(e) The proceeds received, or to be received, from any charges for the use of said airport for airport purposes shall be devoted, first, to the maintenance, upkeep, improvement and operation of such airport and the facilities, structures and improvements thereof, but any surplus remaining at the close of the fiscal year of operation may be expended by the Commissioners Court for any lawful purpose. Added Acts 1949, 51st Leg., p. 503, ch. 276, §1.

19(a) The Commissioners Court of each county of this State, in addition to the powers already conferred upon it by law, is expressly authorized and empowered to contract with the United States Government, or with any agency thereof, and particularly with the Federal Works Administrator, the Housing and Home Finance Administrator, and/or the National Housing Adminstrator, or their successor or successors, for the acquisition of any land, or interest in land, in such county, owned by the United States Government, or any agency thereof, and for the

acquisition of any temporary housing on land which the United States Government, or any agency thereof, may own or control; and each such county in this State is authorized and empowered to acquire by purchase, gift or otherwise, any such land and any such housing from the United States Government, or any agency thereof, and to own and operate such land and housing.

(b) Each Commissioners Court in this State is authorized and empowered to adopt a resolution or order requesting the transfer to said county of any such land or housing, or interest therein, which the United States Government, or any agency thereof, is now, or may be hereafter, authorized to convey or transfer to such county, and each such county, through its Commissioners Court, is expressly authorized and empowered to bind itself to comply with any and all terms and conditions which the United States Government, or any agency thereof, may impose as a prerequisite to the transfer or conveyance of any of such land or housing, or either of them, or any interest therein; and any instrument or deed conveying to said county any such land or any such housing, or any interest therein, may contain any conditions and provisions, covenants and warranties which may be prescribed by the United States Government, or any agency thereof, and agreed upon by said county acting through its Commissioners Court, provided that such terms and conditions are not inhibited by the Constitution of the State of Texas.

(c) For the purpose of purchasing or otherwise acquiring said lands or housing, or both, and improving, enlarging, extending or repairing the same, the Commissioners Court of any county may issue negotiable bonds of the county and levy taxes to provide for the interest and sinking funds of any such bonds so issued, the authority hereby given

for the issuance of such bonds and the levying and collection of such taxes to be exercised in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of Texas, 1925, as amended.

(d) Counties are expressly authorized and empowered to lease or rent any lands, housing, or facilities acquired by them pursuant to this Act and to establish and revise the rent or charges therefor; to arrange or contract for the furnishing by any person or agency, public or private, of services, or facilities for, or in connection with, any of such lands, housing or facilities, or the occupants thereof;

(e) Said counties are further authorized to sell and convey all or any part of the land or housing so acquired or to lease or exchange same; and said counties are further expressly authorized to execute oil, gas or mineral leases covering all or any part of said lands so acquired on such terms and conditions as may be deemed advisable by the Commissioners Court and for such consideration, including oil payments, gas payments, overriding royalties, etc. as may be deemed advisable; and such counties, through their Commissioners Courts, are expressly authorized and empowered to execute conveyances of minerals or mineral rights, and to generally contract for the exploration and development of the minerals underlying said land, if any, or any part thereof. Added Acts 1949, 51st Leg., p. 501, ch. 275, § 1.

20. The Commissioners Court of each county of this State, in addition to the powers already conferred on it by law, is authorized and empowered in all cases where such county has acquired a water supply from subterranean waters for county purposes, to sell, contract to sell and deliver any or all of such water which is not needed for

county purposes to any public or municipal corporation, or political subdivision of this State, including any water control and improvement district, or fresh water supply district now created and existing, or which may hereafter be created under the laws of this State; any such water sold or contracted to be sold and delivered to any such public or municipal corporation or political subdivision of this State, may be used or re-sold for any lawful purpose; and said Commissioners Court shall have the right to fix and determine the rate or rates at which such water shall be sold to any such public or municipal corporation or political subdivision of this State, and to enter into contracts to sell and supply such water at such determined rate or rates for any term of years not exceeding forty (40); and all monies received by the county from the sale of such water shall be placed to the credit of the General Fund of the county and may be expended for general county purposes as now or hereafter permitted by law. Added Acts 1950, 51st Leg., 1st C.S., p. 87, ch. 24 § 1.

V.A.C.S. Article 2352

Art. 2352. [2242] [1538] May levy taxes

Said court shall have the power to levy and collect a tax for county purposes, not to exceed twenty-five cents on the one hundred dollars valuation, and a tax not to exceed fifteen cents on the one hundred dollars valuation to supplement the jury fund of the county, and not to exceed fifteen cents for roads and bridges on the one hundred dollars valuation, except for the payment of debts incurred prior to the adoption of the amendment to the Constitution, September 25, A.D. 1883, and for the erection of public buildings, streets, sewers, water works and other permanent improvements, not to exceed twenty-five

cents on the one hundred dollars valuation in any one year, and except as in the Constitution otherwise provided. They may levy an additional tax for road purposes not to exceed fifteen cents on the one hundred dollar valuation of the property subject to taxation, under the limitations and in the manner provided for in Article 8, Sec. 9, of the Constitution and in pursuance of the laws relating thereto. Const. art. 8, sec. 9; Amendment 1899.

V.A.C.S. Article 2352d

Art. 2352d. Appropriations for advertising and promoting growth and development by home rule cities and counties; Board of Development

Appropriation

Section 1. All counties in the State of Texas may appropriate from the General Fund of said counties an amount not exceeding Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation for the purpose of advertising and promoting the growth and development of such county; providing that before the Commissioners Court of any county may appropriate any sums for such purpose, the qualified taxpaying voters of said county shall, by a majority vote of the persons voting at such election, authorize the County Commissioners to thereafter appropriate not to exceed Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation.

Board of Development Fund; budget

Sec. 2. The amount of money approved by the Commissioners Court for the Board of Development shall constitute a separate fund to be known as the Board of Development Fund and shall not be used for any other

purpose. Each claim against the Board of Development shall be authorized and approved by the Board of Development before presented for payment and after such approval, shall be presented to the Commissioners Court and acted upon as all other claims against the Commissioners Court.

The Board of Development hereinafter provided for shall annually in advance, prepare and submit to the Commissioners Court a budget for the ensuing year in the same manner as required of counties. The money appropriated annually shall be governed by the discretion of the Commissioners Court, but in no event shall said sum be in excess of Five Cents (5¢) on the One Hundred Dollars ($100) assessed valuation.

Board of Development

Sec. 3. There is hereby created, in counties qualifying under this law, a Board of Development, which shall devote its time and effort for the purpose of advertising and promoting the growth and development of any such county. The Board of Development shall be authorized to expend any sums reasonably necessary to accomplish its purposes for personnel, rent, and materials, subject to the approval of the Commissioners Court.

The Board of Development shall consist of five (5) members, to be appointed by the Commissioners Court; said members shall serve for a period of two (2) years from their appointment, without compensation and until their successors are appointed and accept said appointment. Vacancies on such Board shall be filled by the Commissioners Court in the same manner as the original appointment.

Law as cumulative; maximum appropriation

Sec. 4. This law shall be cumulative of all other laws authorizing counties to appropriate money, or to levy a tax for advertising and promotional purposes, and counties shall have the option of operating under any one applicable law, but in any event, the maximum amount of money which can be appropriated for such purpose shall not exceed the limits herein fixed.

Appropriations validated

Sec. 5. Any sums heretofore appropriated or expended for advertising or promotional purposes under any such previous Acts are hereby validated. As amended Acts 1951, 52nd Leg., p. 359, ch. 224, § 1; Acts 1955, 54th Leg., p. 899, ch. 351, § 1.

V.A.C.S. Article 2354

Art. 2354. [2244] [1540] [1517] When tax levied

No county tax shall be levied except at a regular term of the court, and when all members of said court are present. Id.

V.A.C.S. Article 2356

Art. 2356. [2252-3] Bridges in corporate limits

Said court may erect bridges within the corporate limits of any city or town to the same extent and under the same conditions now prescribed by law for the construction of bridges outside the limits of any city or town. Said court and the governing body of any city or town may co-operate in the erection of a bridge within the corporate limits of a city or town, and jointly erect such bridge

upon terms and conditions mutually agreed upon; and either or both the city and county may issue its bonds to pay its proportionate part of the debt by complying with the requirements of the law regulating the issuance of bonds by counties and cities and towns. Acts 1895, p. 164; G.L. vol. 10, p. 894.

APPENDIX "G"

UNITED STATES CONSTITUTION, Amendment XIV, § 1:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "H"

JUDGMENT OF SUPREME COURT OF TEXAS (OMITTING INTRODUCTORY PORTION)

". . . it is, therefore, adjudged, ordered and decreed that the judgments of the District Court and Court of Civil Appeals be, and hereby are, reversed and set aside, and that this cause be, and hereby is, remanded to the District Court for the entry of judgment in accordance with this opinion at a time not to interfere with the 1966 general election process."